But even if the above line of argument is not sound, the statute may still be brought under the police power. That power is not limited merely to health, safety and morals. Distinctly outside of this classification are, for example, the regulation of businesses affected by a public use,[41] and statutes aimed at the development of natural resources.[42] A less conservative view has been often stated that the police power extends to all regulations in the interests of great social and economic needs.[43] That the New York act is in the interest of a great social and economic need seems certain. Such legislation has been advocated by economists,[44] it has been adopted in almost every other civilized country,[45] it is being contemplated in several states of the United States,[46] and the report of the very commission which recommended the New York Statute showed that "our own system of dealing with industrial accidents is economically, morally, and legally unsound." [47]

One cannot but conjecture that the underlying ground for the decision is the conviction of the court that paternalism is contrary to our system of jurisprudence. The New York Court of Appeals has openly assailed paternalism,[48] and traces of this antagonism have cropped out in its decisions from time to time.[49] A contrary notion seems to be entertained by the Supreme Court of the United States [50] and by several careful students of our jurisprudence; [51] and it seems hardly likely that New York's narrow view of due process will find support in other jurisdictions.

THE NATURE OF THE RESPECTIVE INTERESTS OF HUSBAND AND WIFE IN COMMUNITY PROPERTY. — The community system, by which property rights of husband and wife are regulated in no inconsiderable por-

v. Mayor of New York, 31 N. Y. 164, 187. See also Indianapolis Union R. Co. *v.* Houlihan, 157 Ind. 494, 501.

[41] Munn *v.* Illinois, 94 U. S. 113.

[42] Manigault *v.* Springs, 199 U. S. 473; Head *v.* Amoskeag Manufacturing Co., 113 U. S. 9.

[43] In Noble State Bank *v.* Haskell, 219 U. S. 104, 111, Holmes, J., said, "In a general way, the police power extends to all the great public needs." See also Lawton *v.* Steele, 152 U. S. 133, 136, quoted by WATSON, THE CONSTITUTION, 603, "Beyond this, however, the State may interfere whenever the public interests demand it." McGehee in his treatise on DUE PROCESS OF LAW, has under "Police Power" a sub-heading, "Regulation in the Interest of Economic Prosperity and General Welfare" (p. 357), and says (p. 301) that the police power embraces "all legislation looking to the well being of society in its economic and intellectual aspects."

And dangerous employments have been several times mentioned as especially subject to the police power. See Indianapolis Union R. Co. *v.* Houlihan, 157 Ind. 494, 501; Louisville Safety-Vault & Trust Co. *v.* Louisville & N. R. Co., 17 S. W. 567, 569 (Ky.)

[44] See, for example, GILMAN, METHODS OF INDUSTRIAL PEACE, 234; DOWNEY, HISTORY OF LABOR LEGISLATION IN IOWA, 182–185.

[45] A list compiled in 1909 names twenty-three countries which have some form of absolute protection. See BULLETIN ON INDUSTRIAL ACCIDENTS, STATE OF MINN., No. 1, Oct., 1909, p. 5.

[46] See *id.*, pp. 5, 12–13.

[47] Werner, J., in the principal case, 201 N. Y. 287.

[48] See People *v.* Gillson, 109 N. Y. 389, 405.

[49] See People *v.* Hawkins, 157 N. Y. 1; Matter of Jacobs, 98 N. Y. 98.

[50] See Engle *v.* O'Malley, 219 U. S. 128.

[51] See BLACK, CONSTITUTIONAL LAW, Preface to 3 ed.; MCGEHEE, DUE PROCESS OF LAW, 362; Article by Professor Pound, 24 HARV. L. REV. 591.

tion of the United States, is a system wholly foreign to the English common law.[1] It is based on the conception that marriage is a sort of partnership,[2] at least to this extent, that property acquired during the marriage ought, upon its dissolution, to be divided equally between the partners or their respective representatives. But in the definition of their mutual interests while the marriage still continues, the courts of different jurisdictions vary widely.[3] The truth seems to be that, by the law of Spain and Mexico whence the system was derived, there existed a fiction difficult for Anglo-Saxon lawyers to reconcile with the facts. In theory, the property belonged equally to both, and was to be managed by the husband for their common benefit.[4] But in fact, the present rights of the wife were of so shadowy a nature that we find them repeatedly referred to by judges and text-writers as "a mere fictitious interest," [5] "*que se mantiene sôlo como una expectativa*," [6] "*une simple esperance*," [7] "a mere expectancy like that which an heir possesses in the estate of his ancestor." [8] The husband had every substantial incident of ownership and could treat the property as his own. "The community was a partnership that began only at its end."

The United States Supreme Court, overruling the Supreme Court of New Mexico, has recently held that a statute, applying to community property already acquired, might constitutionally deprive the husband of the right to dispose of it without the wife's consent. *Arnett* v. *Reade*, 31 Sup. Ct. Rep. 425.[9] The court, without deciding the exact nature of the wife's interest, seemed to rest the case upon the fact that her interest is at any rate sufficient to be entitled to protection against fraud; *i. e.*, that this was a sort of curative act, not taking from the husband any vested rights, but affording to the wife a more ample protection for rights already theoretically existent.

Against this decision it might well be argued that legal rights not legally enforcible are only solemn make-believe; and that the assumed [10] right of the wife to protection against fraud has no conclusive signifi-

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[1] The system formerly existed, by inheritance from early Spanish settlers, in Florida, the entire Louisiana Purchase territory, and the Mexican cessions. It still prevails, with statutory modifications, in Louisiana, Texas, California, Arizona, New Mexico, Nevada, Idaho, Porto Rico, and the Philippine Islands. It was deliberately adopted by statute in Washington.

[2] The term partnership is more figurative than accurate. See BALLINGER, COMMUNITY PROPERTY, §§ 15–16–17.

[3] Most states adopt the expectancy theory; but in Washington each spouse has a legal interest, misleadingly analogous to a co-tenancy. Holyoke *v.* Jackson, 3 Wash. Ter. 235; Stockland *v.* Bartlett, 4 Wash. 731. In Texas the husband has the whole legal estate subject to an equitable obligation in favor of the wife. Edwards *v.* Brown, 68 Tex. 329. This results from the express words of the Texas code. SAYLES', TEX. CIV. STATUTES, § 2968.

[4] See 5 SANCHEZ ROMAN, ESTUDIOS DE DERECHOS CIVIL, 815.

[5] See FEBRERO MEJICANO, Vol. I, §§ 19–20; Panaud *v.* Jones, 1 Cal. 488; Barnett *v.* Barnett, 50 Pac. 337, 339 (N. M.).

[6] 22 SCAEVOLA, ESPAÑA CODIGO CIVIL, 75, 76.

[7] POTHIER, TRAITÉ DE LA COMMUNAUTÉ, § 497; FRASER, DOMESTIC RELATIONS UNDER THE LAW OF SCOTLAND, 338, 339.

[8] Barnett *v.* Barnett, *supra*. See also Guice *v.* Lawrence, 2 La. Ann. 226.

[9] Spreckels *v.* Spreckels, 116 Cal. 339, reaches the contrary conclusion and is followed by McKenna, J., in his dissent from the main case.

[10] No one seems to know what would constitute fraud. See Garrozi *v.* Dastas, 204 U. S. 64, 78.

cance. Similar protection is afforded to dower,[11] curtesy,[12] and alimony,[13] yet these are mere expectancies,[14] and no one would suggest that their inchoate existence would render constitutional a statute depriving either spouse of the right to dispose freely of his separate property.[15] Secondly, is it true that you may ignore the husband in the protection of the wife? Is he not like a life tenant with power of alienation? It is no mere expectancy that he is deprived of, but the right to sell, waste, give away, or riotously to enjoy.[16] If a husband seized *jure uxoris* cannot be deprived of the right to enjoy the rents and profits,[17] the owner of an easement be deprived of his right of beneficial user,[18] a co-tenant of the right to extract ore,[19] or a husband of the right to convey the homestead,[20] how can this free agent be converted into a Siamese Twin?

The ground of the decision must be, as previously suggested, that the whole institution is so anomalous that common-law analogies are not in point, that the husband, though not a real trustee, is a sort of quasi-trustee, a Spanish distant equivalent of a trustee, for the juristic entity, the community; and that as such he may properly be subjected to a little wing clipping.

NATURE OF RELATION BETWEEN DONEE OF GENERAL POWER OF APPOINTMENT AND PROPERTY SUBJECT THERETO. — A leases property to B for life, and then as C by deed or will shall appoint. What is C's relation to the property? From a study of the cases it is obvious that there exist two wholly distinct and antagonistic conceptions,[1] and that despite their inconsistency either may be applied to the same power by the same court according to the circumstances under which the question is presented.

The first is the strictly technical theory, that C has no interest in the property itself;[2] he is a mere automaton whose function it is to designate another's beneficiary. He is not a conduit of title. He never has title. The appointee takes by relation, not from the instrument executing, but from the instrument creating the power. Accordingly, we find that persons who could not make valid conveyances may exe-

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[11] Swaine *v.* Perine, 5 Johns. Ch. (N. Y.) 482; even though the prospective wife did not know the husband had any property. Chandler *v.* Hollingsworth (N. J.). Cited in 2 BISHOP, LAW OF MARRIED WOMEN, § 343, n.

[12] Freeman *v.* Hartman, 45 Ill. 57.

[13] Murray *v.* Murray, 115 Cal. 266.

[14] Randall *v.* Krieger, 23 Wall. (U. S.) 137. See note on McNeer *v.* McNeer, 19 L. R. A. 256.

[15] Gladney *v.* Snyder, 172 Mo. 318.

[16] Garrozi *v.* Dastas, *supra*; Spreckels *v.* Spreckels, *supra*; Lord *v.* Hough, 43 Cal. 581.

[17] Cases collected in 19 L. R. A. 257, 258.

[18] Eaton *v.* Boston, Concord, & Montreal R. Co., 51 N. H. 504.

[19] See Butte & Boston Consol. Mining Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41.

[20] Gladney *v.* Snyder, *supra*.

[1] Attorney-General *v.* Upton, L. R. 1 Exch. 224, 230, 231.

[2] Middleton *v.* Crofts, 2 Atk. 661; Commonwealth *v.* Williams' Executors, 13 Pa. St. 29; Gilman *v.* Bell, 99 Ill. 144, 150.